

Application No. 09/939,412  
Reply dated January 12, 2006  
Reply to Office Action of August 23, 2005

### **REMARKS**

Claims 1-7, 13-16 and 41-42 are pending in the application. Claims 1-5 and 13-16 have been allowed. Claims 6, 7, 41 and 42 have been rejected.

### **Oath/Declaration**

Applicants respectfully submit that a declaration signed by George Bryan Cornwall was submitted on February 21, 2002, the receipt of which was acknowledged via return postcard stamped March 4, 2002. For the convenience of the Examiner, Applicants have included herewith a copy of the Declaration.

### **Claim Rejections - 35 U.S.C. §102**

The Examiner rejected Independent Claims 6 and 41 under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 4,936,844 to Chandler et al. ("Chandler '844"). Chandler '844 discloses, referring primarily to Fig. 6, bone plate 20 including blade 22 and flange member 30 extending therefrom. In use, blade 22 is driven into bone fragment 52 and flange member 30 is affixed to bone fragment 54 via screw 34 to hold fragments 52 and 54 relative to each other during the healing process.

Independent Claims 6 and 41 both call for, *inter alia*, a bone plate including a plate portion and a substantially straight blade portion extending from one another at an angle and connected to one another at a bend, the bend having a radius defined intermediate the plate portion and the blade portion, the radius *dimensioned* such that, with the plate portion resting against an outer surface of a bone and the blade portion extending into the bone, the radius fits closely adjacent the outside surface of the bone.

The Examiner relies on Fig. 6 of Chandler '844 to disclose a radius between blade 22 and flange member 30 *dimensioned* such that the radius fits closely adjacent the outside surface of the bone, as called for in Claims 6 and 41. Applicants respectfully submit that the drawings of Chandler '844 cannot be relied on for disclosing the dimension of the radius, as Chandler '844 does not indicate that any of the drawings have been drawn to scale. When there is no indication that patent drawings are to scale "it is well established that [the] drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue." *Hockerson-*

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*Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956 (Fed. Cir. 2000). Chandler '844 is silent as to the size of the radius. To reach the conclusion that the radius is dimensioned such that it fits closely adjacent the outside surface of the bone, the scale and dimension of the drawings must be inappropriately relied on in the absence of an indication that the drawings are made to scale. See *Nystrom v. Trex Co.*, No. 03-1092, 2005 WL 2218632, at \*12 (Fed. Cir. Sept. 15, 2005) (stating "arguments based on drawings not explicitly made to scale in issued patents are unavailing").

For the foregoing reasons, Applicants respectfully submit that Independent Claims 6 and 41 are not anticipated by Chandler '844.

#### **Claim Rejections - 35 U.S.C. §103**

The Examiner rejected Claims 7 and 42, which depend from Independent Claims 6 and 41, respectively, under 35 U.S.C. §103(a) as being rendered obvious by Chandler '844. Applicants respectfully submit that, for at least the reasons advanced above, Claims 7 and 42 are in condition for allowance with Independent Claims 6 and 41 from which they depend.

#### **Allowable Subject Matter**

Applicants appreciate the allowance of Claims 1-5 and 13-16.

Applicants respectfully submit that the application is in condition for allowance and such action is earnestly solicited.

In the event Applicants have overlooked the need for an extension of time or payment of fee, Applicants hereby petition therefor and authorize that any charges be made to Deposit Account No. 02-0385, Baker & Daniels.

Application No. 09/939,412  
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If any questions concerning this application should arise, the Examiner is encouraged to telephone the undersigned at 260-424-8000.

Respectfully submitted,



Brian Thomas Geisler  
Registration No. 54,115

Attorney for Applicants

BTG/nw

BAKER & DANIELS  
111 East Wayne Street, Suite 800  
Fort Wayne, IN 46802  
Telephone: 260-424-8000  
Facsimile: 260-460-1700

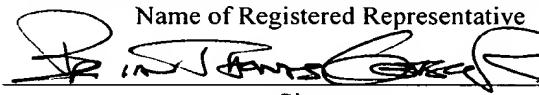
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Declaration  
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CERTIFICATION OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on: January 12, 2006

BRIAN THOMAS GEISLER, REG. NO. 54,115

Name of Registered Representative

  
Signature

January 12, 2006

Date

RECEIPT IS ACKNOWLEDGED OF:

TYPE OF PAPER: Response to Notice of Missing Parts of Application  
APPLICANT: Jerry L. Aikins et al.  
SERIAL NO. 09/939,412  
FILING DATE: August 24, 2001  
TITLE: BLADE PLATE AND INSTRUMENTS  
ENC.: Response, Executed Declaration, PTO Missing Parts Form,  
and Check No. 1023931

DATE MAILED: February 21, 2002

AFC:PMP

Our Ref.: ZIM0090

